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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 GEMINI H. REYES,

11 Plaintiff,

12 v.

13 FIRCREST SCHOOL,

14 Defendant.

CASE NO. C11-0778JLR

ORDER ON MOTION TO
DISMISS

15 **I. INTRODUCTION**

16 This matter comes before the court on Defendant Fircrest Residential Habilitation
17 Center's ("Fircrest")¹ motion to dismiss (Mot. (Dkt. # 20)) *pro se* Plaintiff Gemini Reyes'
18 complaint (Compl. (Dkt. # 1)). Fircrest asks the court to either (1) dismiss the complaint
19 or quash service under Federal Rule of Civil Procedure 12(b)(5) for failure to properly

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22 ¹ Ms. Reyes improperly names "Fircrest School" as the defendant, however, sometimes
Fircrest is referred to as "Fircrest School." (See Mot. at 1.)

1 effectuate service, (2) dismiss the complaint under Rule 12(b)(6) for failure to state a
 2 claim, or (3) require Ms. Reyes to file a more definite statement pursuant to Rule 12(e).
 3 (*See generally* Mot.)

4 Having considered the submissions of the parties, the balance of the record, and
 5 the relevant law, and no party having requested oral argument, the court GRANTS in part
 6 and DENIES in part as MOOT Fircrest's motion to dismiss (Dkt. # 20). The court grants
 7 the motion under Rule 12(b)(5) and quashes Ms. Reyes' prior attempts at service. The
 8 court orders Ms. Reyes, within 30 days from the date of this order, to (1) properly serve
 9 Fircrest as described in this order, and (2) file a submission with the court clearly
 10 establishing proper service. The court will dismiss this action without prejudice if Ms.
 11 Reyes fails to properly effectuate service and notify the court within the prescribed time
 12 period. The court denies the remainder of Fircrest's motion as moot.

13 II. BACKGROUND

14 On June 16, 2011, Ms. Reyes filed her complaint against Fircrest, a state-run
 15 facility for people with developmental disabilities that is managed by the Washington
 16 State Department of Social and Health Services.² Although the handwritten complaint is
 17 difficult to comprehend and illegible in part, the court construes it liberally in light of Ms.

18 ² Ms. Reyes does not allege in the complaint that Fircrest is a state entity. (*See generally*
 19 Compl.) The court, however, takes judicial notice of the fact that Fircrest is a state entity
 20 because this fact is "capable of accurate and ready determination by resort to sources whose
 21 accuracy cannot be reasonably questioned." *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir.
 22 2003) (internal quotations omitted). Fircrest's website, located at <http://www.dshs.wa.gov/ddd/Fircrest.shtml>, identifies the habilitation center as a state entity. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 213 n.7 (2008) (taking judicial notice of information on government website).

1 Reyes' *pro se* status, *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1011 (9th Cir. 2011),
2 and discerns the following allegations. Ms. Reyes alleges that Fircrest violated her civil
3 rights. (Mot. at 2.) It appears from her complaint that she was on leave while her
4 husband was dying, that her husband died August 12, 2010, and that she was terminated
5 from her job on August 21, 2010. (*Id.* at 3.) Additionally, she alleges that she became
6 sick while outside the United States and that her medical insurance was cancelled
7 because she had used all of her sick leave and vacation time. (*Id.*) It is unclear from the
8 complaint if her illness began before her termination. (*Id.*) Ms. Reyes seeks payment for
9 her medical expenses. (*Id.*)

10 On April 4, 2012, the court issued an order to show cause why the court should not
11 dismiss the action because Ms. Reyes had not properly served Fircrest with a summons
12 and a copy of the complaint within the timeframe provided in Federal Rule of Civil
13 Procedure 4(m). (Order (Dkt. # 9).) On May 16 and May 18, 2012, Ms. Reyes filed
14 copies of her post office receipts that allegedly show items were mailed to Fircrest using
15 certified mail (Dkt. ## 15, 16). It is unclear, however, what Ms. Reyes mailed to Fircrest
16 because she did not file an affidavit or other explanation identifying the contents of her
17 mailings (*See* Dkt. ## 15, 16).

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III. ANALYSIS

Fircrest seeks to have the court order Ms. Reyes to properly effectuate service or to dismiss the complaint under Rule 12(b)(5) for insufficient service of process.³ (Mot. at 3.) Alternatively, Fircrest moves to dismiss Ms. Reyes' complaint under Rule 12(b)(6) or for the court to order Ms. Reyes to file a more definite statement under Rule 12(e). (*See generally* Mot.) Because the court agrees with Fircrest, as discussed in more detail below, that Ms. Reyes has not effectuated proper service as required by Rule 4, the court is without jurisdiction to consider Fircrest's remaining arguments. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982) (noting that "[d]efendants must be served in accordance with [R]ule 4(d) of the Federal Rules of Civil Procedure, or there is no personal jurisdiction"). The court thus grants Fircrest's Rule 12(b)(5) motion and denies the remainder of its motion as moot.

When a defendant challenges service, the plaintiff bears the burden of establishing the validity of service as governed by Rule 4. *See Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). As a general principle, "Rule 4 is a flexible rule that should be liberally construed," *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984), and "substantial compliance with the service requirements of Rule 4 is sufficient so long as the opposing

³ The court considers the Rule 12(b)(5) motion even though Fircrest has appeared in this matter because Fircrest did so "without waiving objection as to improper service." (Dkt. # 18.) Therefore, the court does not consider Fircrest's appearance to be a waiver of its right to litigate service. *See T-Scan Corp. v. BPA Tech., Inc.*, No. 2:10-CV-00470-MJP, 2011 WL 240517, at *1 (W.D. Wash. Jan. 24, 2011) (granting Rule 12(b)(5) motion to dismiss for insufficient service even after the defendant filed a notice of appearance that specifically disclaimed waiver of an insufficient service of process defense).

1 party receives sufficient notice,” *Daly-Murphy v. Winston*, 837 F.2d 348, 355 n.4 (9th
2 Cir. 1987). The sufficient notice exception, however, also “contains a justifiable excuse
3 requirement.” *Id.* (internal quotations omitted). A party’s *pro se* status, alone, is not a
4 justifiable excuse for the defect. *See Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th Cir.
5 1992) (concluding that *pro se* plaintiff had not properly served defendants and that he
6 lacked good cause for the defective service).

7 Additionally, the Ninth Circuit Court of Appeals has held that a party’s failure to
8 strictly comply with Rule 4’s service requirement does not warrant dismissal if: “(a) the
9 party that had to be served personally received actual notice, (b) the defendant would
10 suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the
11 failure to serve properly, and (d) the plaintiff would be severely prejudiced if his
12 complaint were dismissed.” *Borzeka*, 739 F.2d at 447 (adopting exception to strict
13 compliance for service made upon the United States government); *see also S.J., ex rel.*
14 *S.H.J. v. Issaquah Sch. Dist.*, No. C04-1926RSL, 2007 WL 764916, at *2 (W.D. Wash.
15 Mar. 8, 2007) (concluding that the reasoning in *Borzeka* also applies to service upon local
16 governments).

17 Fircrest argues that Ms. Reyes failed to comply with Rule 4, which sets forth
18 procedures for serving a defendant. (Mot. at 3.) Rule 4(j)(2) governs service on state
19 entities, such as Fircrest, and requires that service on a state entity be made by either “(A)
20 delivering a copy of the summons and of the complaint to its chief executive officer; or
21 (B) serving a copy of each in the manner prescribed by that state’s law for serving a
22 summons or like process on such a defendant.” Fed. R. Civ. P. 4(j)(2). Washington State

1 requires that service of a complaint and a summons upon a state agency must be done by
2 service “upon the attorney general, or by leaving the summons and complaint in the
3 office of the attorney general with an assistant attorney general.” RCW 4.92.020.

4 The court concludes that Ms. Reyes has failed to meet her burden of
5 demonstrating that she complied with Rule 4(j)(2) in serving Fircrest. She attempted to
6 effectuate service by certified mail, however certified mail is not sufficient under either
7 prong of Rule 4(j)(2). First, Rule 4(j)(2)(A) does not provide for service by mail. Fed. R.
8 Civ. P. 4(j)(2)(A); *cf.* Fed. R. Civ. P. 4(f)(2)(C)(ii) and 4(i)(1)(A)(ii); *see also* *McCurdy v.*
9 *Cambridge Sch. Dist. No. 432*, No. 1:10-CV-150-BLW, 2010 WL 4666046, at *1 (D.
10 Idaho Nov. 8, 2010) (noting that “service by mail is not addressed by Rule 4(j)(A)” and
11 then considering whether service by mail was appropriate under state law pursuant to
12 Rule 4(j)(B)); *Yates v. Baldwin*, 633 F.3d 669, 672 (8th Cir. 2011) (noting that certified
13 mail does not constitute “delivering” under Rule 4). Second, Ms. Reyes has not satisfied
14 Rule 4(j)(2)(B) because certified mail is not a valid way of effectuating service under
15 Washington law. RCW 4.92.020; *see also* *Robinson v. Tacoma Cmty. Coll.*, No. C11-
16 5151BHS, 2011 WL 1883821, at *4 (W.D. Wash. May 17, 2011) (noting that mailing a
17 complaint to a state agency is not proper service under Washington law). Rather,
18 Washington law requires that service upon a state agency be made by either serving the
19 attorney general or “by leaving the summons and complaint in the office of the attorney
20 general with an assistant attorney general.” RCW 4.92.020. Accordingly, Ms. Reyes has
21 not met her burden of establishing her compliance with Rule 4(j)(2).
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1 Additionally, Ms. Reyes' failure to strictly comply with Rule 4(j)(2) is not excused
2 under *Dale-Murphy*'s sufficient notice exception or *Borzeka*'s four-part test because she
3 has not offered a justifiable excuse for her failure to properly serve Fircrest. Even if Ms.
4 Reyes' failure to properly serve Fircrest or provide an explanation for the failure is
5 attributed to inadvertent error or ignorance of the governing rules, neither of these
6 reasons constitute good cause. *See Townsel v. Cnty. of Contra Costa*, 820 F.2d 319, 320
7 (9th Cir. 1987) (noting that ignorance of Rule 4 or inadvertent failure to comply with the
8 Rule's requirement did not constitute good cause).

9 Because Ms. Reyes has not satisfied her burden of demonstrating proper service,
10 the court has discretion to either dismiss or retain the action. *See Stevens v. Sec. Pac.*
11 *Nat'l Bank*, 538 F.2d 1387, 1389 (9th Cir. 1976). "Dismissal of a complaint is
12 inappropriate when there exists a reasonable prospect that service may yet be obtained.
13 In such instances, the district court should, at most, quash service, leaving the plaintiffs
14 free to effect proper service." *Arasan Chip Sys., Inc. v. Sonix Tech. Co. Ltd.*, No. 509-
15 CV-02172 JF PVT, 2010 WL 890424, at *1 (N.D. Cal. Mar. 8, 2010) (internal quotation
16 omitted); *see also Randolph v. City of E. Palo Alto*, No. C 06-07476 SI, 2007 WL
17 1232057, at *3 (N.D. Cal. Apr. 26, 2007) (noting that "[i]f the Court decides not to
18 dismiss, it quashes the ineffective service that has been made on the defendant and
19 provides the plaintiff the opportunity to serve the defendant again effectively"); *S.J. v.*
20 *Issaquah Sch. Dist. No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006) (noting that "even if
21 service were insufficient—on which we express no opinion—we could not simply affirm
22 dismissal because the district court has discretion to dismiss an action or to quash

1 service”). Here, the court determines that there is a reasonable prospect that service can
2 be properly effectuated, and therefore, the court retains the action but quashes Ms. Reyes’
3 prior attempts at service. Ms. Reyes must, within 30 days of the date of this order,
4 properly effectuate service on Fircrest by either (1) delivering a copy of the summons and
5 the complaint to the Department of Social and Health Services’ chief executive officer, or
6 (2) serving the Washington State attorney general or leaving the summons and a copy of
7 the complaint in the office of the Washington State attorney general with an assistant
8 attorney general. Fed. R. Civ. P 4(j)(2); RCW 4.92.020. Also, within 30 days of the date
9 of this order, Ms. Reyes must file a submission with the court clearly establishing her
10 proper service of the summons and a copy of the complaint on Fircrest.

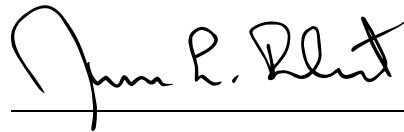
11 **IV. CONCLUSION**

12 For the foregoing reasons, the court GRANTS in part and DENIES in part as
13 MOOT Fircrest’s motion to dismiss (Dkt. # 20). The court grants the motion under
14 Federal Rule of Civil Procedure 12(b)(5) and quashes Ms. Reyes’ prior attempts at
15 service. The court orders Ms. Reyes, within 30 days from the date of this order, to (1)
16 properly serve Fircrest as described in this order, and (2) file a submission with the court
17 clearly demonstrating proper service. The court will dismiss this action without prejudice

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1 if Ms. Reyes fails to properly effectuate service and notify the court within the
2 prescribed time period. The court denies the remainder of Fircrest's motion as moot.

3 Dated this 1st day of August, 2012.

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6 JAMES L. ROBART
7 United States District Judge
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